



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 30, 2004

Mr. Lawrence G. Provins
Assistant City Attorney
City of Pearland
3519 Liberty Drive
Pearland, Texas 77581-5416

OR2004-0690

Dear Mr. Provins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195275.

The City of Pearland (the "city") received a request for complaints made from a specified address. You claim that the requested information is excepted from disclosure pursuant to sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample document.¹

Initially, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). You indicate that the submitted information constitutes information from a completed investigation that was made of, for, or by a governmental

¹ We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

body. Therefore, the city must release the submitted information, unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. You claim that the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law informer's privilege.² We note that Texas courts have long recognized the common-law informer's privilege. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *see also Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928); *Roviaro v. United States*, 353 U.S. 53, 59 (1957). However, we also note that the informer's privilege under *Roviaro* exists to protect a governmental body's interest. Thus, the informer's privilege under *Roviaro* may be waived by a governmental body and does not constitute other law that makes information confidential for purposes of section 552.022 of the Government Code. *See Open Records Decision No. 549 at 6* (1990). Accordingly, we conclude that the city may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. However, we note that the informer's privilege also is found in rule 508 of the Texas Rules of Evidence. *See Tex. R. Evid. 508*. The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether any portion of the submitted information is confidential under rule 508 and will consider your claim under section 552.108 of the Government Code.

Rule 508 provides in relevant part:

(a) Rule of Privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who May Claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except the privilege shall not be allowed in criminal cases if the state objects.

TEX. R. EVID. 508(a)-(b). Thus, an informer's identity is confidential under rule 508 if a governmental body demonstrates that an individual has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation and the information does not fall within the purview of the exceptions to the privilege enumerated in rule 508(c).

² Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by the common-law informer's privilege.

You indicate that the submitted information relates to complaints of potential violations of the city's rules for animal control. Although the submitted information reflects that a complaint was made from the address stated in the request to the Pearland Animal Control & Adoption Center (the "center"), you have not explained how the person to whom this complaint was made at the center is a "law enforcement officer" or how any portion of the submitted information otherwise relates to an individual who has furnished information to a "law enforcement officer" or member of a legislative committee or its staff for purposes of rule 508. Accordingly, we conclude that the city may not withhold any portion of the submitted information under rule 508 of the Texas Rules of Evidence.

Section 552.108 of the Government Code excepts from disclosure certain records of law enforcement agencies and prosecutors. *See* Gov't Code § 552.108. Section 552.108 applies only to records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce criminal laws. *See* Open Records Decision Nos. 493 (1988), 287 (1981). Section 552.108 generally does not apply to records created by an agency whose chief function is essentially regulatory in nature. *See* Open Records Decision No. 199 (1978). An agency that does not qualify as a law enforcement agency may, under certain limited circumstances, claim that section 552.108 protects records in its possession. *See, e.g.,* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision Nos. 493 (1988), 272 (1981). If an administrative agency's investigation reveals possible criminal conduct that the administrative agency intends to report or has already reported to the appropriate law enforcement agency, section 552.108 will apply to information gathered by the administrative agency, if its release would interfere with law enforcement. *See* Gov't Code 552.108(a)(1), (b)(1); *see also* Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 493 (1988), 272 (1981).

Based on our review of the submitted information, it appears that the complaint noted therein was made to the center. However, you have neither explained to us how the center is a law enforcement agency or that the submitted information has been forwarded to an appropriate law enforcement agency. Accordingly, we conclude that the city may not withhold any portion of the submitted information under section 552.108 of the Government Code. Consequently, the city must release the entirety of the submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 194275

Enc. Submitted document

cc: Ms. Sherry Palermo
1503 Ash Run
Pearland, Texas 77581
(w/o enclosures)